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In the
Supreme Court of the United States

October Term, 1960

No. 658

UNION LEADER CORPORATION,
PETITIONER

v.

NEWSPAPERS OF NEW ENGLAND, INC., ET AL.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is not yet reported but is printed in Ap-

pendix A to this petition.[1] The opinion of the United States District Court for the District of Massachusetts is reported at 180 F. Supp. 125.

Jurisdiction

The judgment of the Court of Appeals was entered on December 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether in a community where one newspaper enjoyed a monopoly until the entry of a competitor and a struggle for survival began, the first newspaper is justified in giving secret discriminatory advertising benefits to resist the deterioration of its position, in view of Section 2 of the Sherman Act.

2. Whether, in view of Section 2 of the Sherman Act and Section 7 of the Clayton Act, publishers of some 22 newspapers in a region may combine to acquire all of the stock and to direct and finance the operations of one of two competing newspapers in a regional community where:

(a) the acquiring publishers believed that the community could support only one newspaper;
(b) the acquiring publishers made the acquisition in part for investment purposes;
(c) many of the acquiring publishers enjoyed a monopoly of newspaper distribution in their individual communities; and
(d) some of the acquiring publishers acted in part because they feared that the publisher of the com-

[1] (App. A) as used hereinafter refers to the opinion of the Court of Appeals as printed in Appendix A.

peting newspaper might introduce a competing newspaper in their individual communities.

Statutes Involved

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2 and Sections 4, 7 and 16 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Sections 15, 18 and 26 all of which are set forth in Appendix B to this petition, pp. 39-41.

Statement of the Case

I. Introduction

This action was brought by petitioner, Union Leader Corporation, for treble damages allegedly resulting from violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, by respondent Newspapers of New England, Inc. (hereinafter called NNE), NNE's component members and the Haverhill Gazette Company and violations of Section 7 of the Clayton Act as amended, 15 U.S.C. 18, by NNE. The Haverhill Gazette filed a counterclaim alleging violations of Sections 1 and 2 of the Sherman Act by petitioner.

After a trial without jury upon all issues other than damages, the District Court dismissed all claims of petitioner except against the Haverhill Gazette Company which it found to have attempted to monopolize by illegal price discrimination. The District Court also found, under the counterclaim, that petitioner attempted to monopolize. Both parties appealed. The Court of Appeals upheld the District Court as to the violation by Union Leader but reversed as to the violation by the Haverhill Gazette.

For many years prior to November 1957, the Haverhill

Gazette Company, hereinafter called the Gazette, published the only daily newspaper in Haverhill, Massachusetts (Finding 7, R.A. 1068).[2] On November 20, 1957, a strike was called by the Gazette's printers, causing a cessation of publication for three days (Finding 9, R.A. 1069). Publication was resumed by the hiring of nonunion printers although the strike continued. The District Court found that there was strong union sentiment in Haverhill and that, during the strike, the Gazette's circulation and advertising fell off by fifty per cent (Finding 10, R.A. 1069).

In Manchester, New Hampshire, some 28 miles from Haverhill, petitioner published the only daily newspaper, the Manchester Union Leader. William Loeb is the President and largest stockholder of petitioner. On November 30, 1957, six Haverhill merchants visited Mr. Loeb in Manchester and urged him to publish, in Haverhill, a free "shopper" in which they could place Christmas advertising without giving offense to the union (Finding 11, R.A. 1069-1070). The Union Leader published two shoppers for Haverhill on December 5 and December 12, 1957, both issues receiving a favorable response. On that basis, petitioner began the publication in its Manchester plant of a daily newspaper, called the Haverhill Journal, for distribution in Haverhill (Finding 15, R.A. 1071). In the first week of publication, the average circulation of the Journal

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[2] Both petitioner and respondent Haverhill Gazette Company appealed from the judgment of the District Court. Petitioner's appeal was docketed in the Court of Appeals as No. 5619 and that of the Gazette as No. 5620. The entire record in both appeals is contained in three volumes. Volume I contains the Record Appendix to Brief for Appellant in No. 5619, and Record Appendix to Brief for Appellee in No. 5620. Volume II contains the Record Appendix to Brief for Appellant in No. 5619, Record Appendix to Brief for Appellee in No. 5620 and Supplemental Record Appendix to Brief for Appellant in No. 5619. Volume III contains the Record Appendix to Brief for Appellant in No. 5620 and Proceedings in Court of Appeals. This record will be referred to hereinafter as R.A. followed by the appropriate page number.

was 9,881 while that of the Gazette was 8,722 (Ex. S-11, S-12, R.A. 1246-1249). Active competition between the two papers has occurred ever since in what the District Court described as a "life-and-death struggle" (Finding 7, R.A. 1068). Witnesses for petitioner testified that Haverhill could support two daily newspapers (R.A. 129, 264). However the participants in NNE all believed that Haverhill could only profitably support one newspaper (R.A. 394, 395). The District Court found as a fact that Haverhill is economically a one newspaper city (Finding 9, R.A. 1069). With this finding as a basis, both the District Court and the Court of Appeals concluded that it was inevitable that only one competitor would survive in Haverhill.

Both courts below agreed on the principle announced by the Court of Appeals that

> . . . a natural monopoly market does not of itself, impose restrictions on one who actively, but fairly, competes for it any more than it does on one who passively acquires it. In either event there must be some affirmative showing of conduct from which a wrongful intent can be inferred. (App. A 26)

Neither of the courts below found any illegal intent in either the entry of the Journal in Haverhill or in the possession, prior to November, 1957, of a "natural monopoly" by the Gazette. The relationship of the Union Leader with certain Haverhill merchants and its relations with some members of the striking union were found by the courts below to be evidence of its exclusionary intent. Petitioner does not believe that the findings in either of these cases can be sustained from the uncontroverted evidence presented. However, since petitioner submits that the writ should be granted even assuming the correctness of such findings, they will not be further examined herein.

II. Advertising Rates of the Two Newspapers

The Journal began publication on December 16, 1957. At the outset, the Journal publicly announced rates higher than the Gazette's. For example, the Gazette had a basic local display rate of $1.40; the Journal began with a local display rate of $2.10 but in January of 1958, it retroactively changed the rate to $1.47 by application of credit to future bills (Finding 30, R.A. 1077).

The District Court went on to find that "then" i. e. after January of 1958, the Journal became aggressively competitive and resorted to private concessions (Finding 31. R.A. 1077).

Finding 32 of the District Court states "The Gazette likewise resorted to secret discriminatory practices. The clearest instances occurred from September through December 1958." . . . (R.A. 1077).

The District Court made no finding as to which paper started the practice of price discrimination since under its theory of law there was no need. However, the evidence is uncontradicted that the first secret rebates were given by the Gazette in December of 1957 and January of 1958. John W. Russ, President and Treasurer of the Gazette from 1955 to January 1959, on being asked whether in December 1957 and January 1958, the Gazette charged a $.90 rate even though its announced rate was $1.40, replied:

> I recall that the advertising manager had been allowing discounts greater than the rate schedule called for . . . (R.A. 281).

Exhibit S-29 (R.A. 1340) shows for this two month period that the Gazette charged a $.90 rate despite its published rate of $1.40. Thus, while it is apparent that both papers

resorted to price concessions, the practice of offering secret rebates was started by the Gazette.

III. The Formation and Functioning of NNE

Petitioner contended before the District Court that there was "a wider market" involved than that of Haverhill and that any area in which individual newspapers who became shareholders of NNE are now doing business is a market of entry. The District Court refused to consider evidence of such a market. For example, on September 16, 1959, in a pre-trial hearing the District Court made the following statement:

> Then, paragraph (c) will have to be changed to read "that market" instead of "the market." All that the stipulation will cover is the single Haverhill market. If the plaintiff insists on trying to offer evidence with respect to other markets, I shall look with a very jaundiced eye upon such an offer, and I now indicate that it is more probable than not, that at the trial I shall exclude as cumulative, superfluous, unnecessary, a cause for delay in the disposition of the case, without any significance of any kind except piling Ossa on Pelion, to include any additional market. (R.A. 1369)

The Court of Appeals subsequently overruled the District Court and upheld petitioner's legal position, stating:

> . . . in whatever measure any shareholder [of NNE] was concerned in protecting its own narrow market it was aided by others similarly situated. To this degree, we see a wider market and the possibility of an illegal transaction. (App. A 36)

The Court of Appeals then examined the motivation for the formation of NNE " . . . giving fullest play to the evidence : . . " and concluded that :

> Union Leader produced no evidence that the shareholders [of NNE] feared competition as such, or had any reason to (App. A 36)

Despite the District Court's broad ruling against the introduction of evidence as to the wider market, there was evidence introduced as to the motivation of the shareholders of NNE and some findings made on this point.

When the union threatened to strike, Russ, then President of the Gazette, sent for William B. Parry, then associate manager of the New England Daily Newspaper Association (Finding 33, R.A. 1078). Parry was lined up on the side of the Gazette and thought that the Journal was on the side of the Union (R.A. 391). From the time Parry was called into the labor dispute, around December, 1957, he was in general touch with the Gazette's problems. In April, 1958, Parry was asked by Russ whether money could be raised from other publishers to help the Gazette. Nothing came of this inquiry (Finding 34, R.A. 1078). Meanwhile Russ was in touch with other publishers personally. On June 24, 1958, Russ reported to the directors of the Gazette that Mr. Lucey of the Lawrence (Mass.) Eagle Tribune, Mr. Lawson of the Lynn (Mass.) paper, Mr. Lawlor of the Lowell (Mass.) Sun and Mr. Hartford of the Portsmouth (N. H.) paper had offered their services if in any way they could help and advise the Gazette Company in the serious situation caused by the composing room strike and the competing newspaper (R.A. 296; Ex S-9, R.A. 1237).

On July 22, 1958 Russ reported to his directors that he

met with three of the same men in Portsmouth, New Hampshire, Lucey, Hartford and Lawlor and:

> Their only interest, he said, seemed to be in keeping the Journal from taking over in their territory and they were more than willing that the Gazette should do the fighting (R.A. 414; Ex. S-9, R.A. 1238).

Lawlor and Lucey did not deny that the meeting was held but did deny that Mr. Russ's report corresponded to their impression (R.A. 448, 461). Mr. Russ's report was contemporaneous with the event, the denials of Lucey and Lawlor were made at trial in response to questions by their counsel.

During the summer of 1958, approaches were made to the Gazette by the Union Leader to purchase the Gazette. Finally, on October 21, 1958 Mr. Loeb made a written offer to purchase the stock of the Gazette (Finding 35, R.A. 1078, 1079). Russ promptly called Parry and told him that he would be forced to sell to Loeb unless other financing was available. Parry immediately called Lucey, of Lawrence who informed Lawlor of Lowell and as a result of these conversations, Parry, ten days later on October 31, 1958 held a meeting with certain New England publishers to discuss financing the Gazette (Finding 36, R.A. 1079). These publishers were informed subsequent to this meeting that the group could buy the paper if it could approximately match Mr. Loeb's offer (Finding 39, R.A. 1080). Parry then prepared a list of about 50 publishers and the amounts he hoped each would subscribe to purchase the Gazette (Finding 39, R.A. 1080).

When he called these prospects, Parry told them the Gazette was for sale, that Loeb had made an offer and also told some of them that "if Loeb succeeded in Haverhill that then he and the union might get together and

come into their territory" (Finding 40, R.A. 1081). A second meeting was held on November 10, 1958. At this meeting there was discussion of the Loeb offer and the Gazette losses. It was the participants' unanimous opinion that only one newspaper could survive in Haverhill and make a profit. Reference was made to the strong distaste of some of the group to the methods of Loeb, to Loeb's relations with unions, to the timing of the Union Leader's entry into Haverhill, to the Journal's advertising rates and to the possibility "that, if he was successful here he could use the same tactics in other places". (Finding 42, R.A. 1081, 1082). Lawlor of Lowell testified:

> I would be much more interested in seeing Mr. Loeb get his come-uppance than I would be in seeing John Jones of Attleboro making money (R.A. 430).

Weld, publisher of the papers in Newburyport and Gloucester, neighboring Haverhill, testified that his decision to join the NNE was influenced by his fear that Mr. Loeb, if successful in Haverhill, could go against his papers (R.A. 505, 506). On December 10, 1958, the committee organized NNE and bought the stock of the Gazette (Finding 46, R.A. 1084).

Among those who became NNE shareholders were Lowell Sun Publishing Company which publishes the only daily newspaper in Lowell, Eagle-Tribune Publishing Company which publishes the only daily newspaper in Lawrence, Enterprise Publishing Company which publishes the only daily newspaper in Brockton, Sentinel Printing Company which publishes the only daily newspaper in Fitchburg, Eagle Publishing Company which publishes the only daily newspaper in Pittsfield, Holyoke Transcript Telegram Publishing Co., Inc. which publishes the only daily newspaper in Holyoke and Phillip S. Weld who con

trols Essex County Newspapers Inc. which publishes the only daily newspapers in Newburyport and Gloucester. Among the other NNE subscribers are many other publishing companies, each of which publishes in its own town the only local daily newspaper published there (Finding 45, R.A. 1083, 1084). No single individual in the group wanted to purchase the Gazette alone (R.A. 428, 453, 648). At all relevant times, in both NNE and the Gazette, the President has been Lawlor, the Treasurer, Lucey, the Clerk, Weld. Neither officers nor directors have received any compensation (Finding 48, R.A. 1085). NNE has loaned over $100,000 to the Gazette without any repayment (Finding 47, R.A. 1085).

The participants in NNE had no idea that there would be immediate profits (R.A. 432), nor did they make any forecast as to when a profit could be expected (R.A. 652, 660). Their offer for the Gazette was made so that Loeb would not buy the property (Findings 49(a) and (b), R.A. 1085). Every NNE shareholder in purchasing acted in part because he believed that the investment was commercially justified (Finding 49(f), R.A. 1086).

About November, 1958 Ellis Rietzel was hired by NNE as publisher of the Gazette and came to Haverhill in December, 1958 (R.A. 567). In January or February of 1959, at a meeting of the Gazette's editorial staff, Reitzel, according to a Gazette reporter, stated that the purpose of the Gazette "was to contain the Loeb enterprises in their current state or to keep Loeb out of Massachusetts" (R.A. 619).

There have been only two daily newspapers started in the New England area, including the Journal, in over twenty years (R.A. 413, 649). The other such competitive paper, in Dover, New Hampshire, went out of business shortly after it was started (Ex. S-33, R.A. 1363). In Massachusetts, Boston, Haverhill and Lynn are the only

areas which have competing local daily newspapers. In New Hampshire, there are no local daily newspapers in competition with each other (Ex. S-33, R.A. 1363).

The District Court, consistent with its pre-trial pronouncement as to the lack of significance of evidence pertaining to the "wider market", excluded the evidence offered in Ex. S-33 to show the population of areas in New England served by daily newspapers and the circulations of those newspapers (R.A. 163, 164). This evidence would have permitted a better view of this "wider market" of entry and the positions in and relations to that market held by the shareholders of NNE.

Reasons for Granting the Writ

It is important that this Court review the judgment of the Court of Appeals. This case concerns petitioner's attempt to distribute a new newspaper in a New England community to compete with a long-established newspaper. It is only the second such attempt in the last twenty years and, as the Court of Appeals pointed out in its opinion, the first attempt failed. The record here should be scrutinized by this Court to insure that violations of the antitrust laws do not thwart the present attempt. The significance of this case is captured by this quotation from *Associated Press v. United States*, 326 U.S. 1 at p. 20:

> . . . Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests . . .

Question I

The Court of Appeal's reversal of the District Court's injunction against respondent Gazette's discriminatory pricing practices and attempt to monopolize is in conflict with decisions of this Court.

In Finding 32 the District Court declared that the Gazette had resorted to secret discriminatory practices in advertising rates (R.A. 1077-1078). In Conclusions of Law 17 and 18 the District Court held that these secret discriminatory advertising rates of the Gazette were capricious, belied the Gazette's public rate card and were inexcusable on the plea that they matched offers of petitioner (R.A. 1095, 1096). In the latter regard, the District Court cited *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons Co.*, 340 U.S. 211. The District Court continued that, having about fifty per cent of the market, knowing that the market would not permit two contestants to survive, the Gazette's resort to such a practice demonstrated its exclusionary intent and constituted an attempt to monopolize in violation of 2 of the Sherman Act.

Accordingly, in paragraph 2 of its Partial Final Decree the District Court required the Gazette to publish and to conform strictly to a schedule of rates for each type of accepted advertising (R.A. 1102). In paragraph 6 of its decree the District Court ordered petitioner to prepare a schedule of the damages suffered on account of the Gazette's advertising discrimination (R.A. 1104). Paragraph 10 of the decree directed the Gazette to refrain from attempting in any way to monopolize the Haverhill market (R.A. 1105).

The Court of Appeals reversed the decision of the District Court on the question of the Gazette's discriminatory advertising practices and ordered paragraphs 2, 6 and 8 to be stricken from the Partial Final Decree (App. A 38).

In so ruling, the Court of Appeals recognized that the mere fact that petitioner might have violated the antitrust laws would not excuse the Gazette from a like offense and a consequent obligation to respond in damages to petitioner. However, the Court of Appeals held that because "in giving these discriminatory benefits, Gazette was acting only after it had been put in peril of insolvency in the equity sense as a result of Union Leader's attempt to monopolize", the Gazette's discriminatory practices did not constitute a violation of the antitrust laws (App., A 32).

This conclusion of the Court of Appeals overlooks the fact that the District Court found that all elements of an antitrust violation had been established by the evidence of the Gazette's discriminatory pricing practice. The Gazette engaged in the practice; it had, according to the District Court, fifty per cent of a thin market at the time; and its intent in pursuing the practice under those circumstances could only be exclusionary. Moreover, although not critical to a proper decision of this case, the implication of the Court of Appeal's statement that the Gazette resorted to discriminatory pricing only after petitioner's Journal had started it, is not supported by the findings of the District Court and is contrary to the evidence.

Because of the views it held, the District Court did not feel it necessary to make a precise finding as to which Haverhill newspaper started discriminatory pricing. However, as pointed out in the Statement of the Case, the uncontradicted evidence shows that the Gazette commenced the practice.

The action of the Court of Appeals in relieving the Gazette of the duties imposed by the District Court of charging uniform advertising rates and of refraining from attempting to monopolize at a time when it had half of the market, invites consequences disastrous to petitioner. Since the Court of Appeals prescribed no stop-

ping point for the Gazette's discriminatory pricing, it might well continue at will until the Journal is eliminated from the scene.

The effect of the Court of Appeal's decision on pricing is that, if one once enjoys a monopoly, he may pursue conduct ordinarily violative of the antitrust laws to the extermination of any rival who draws even by stepping over the antitrust bounds in some unspecified degree. At the least, the provisions of the Partial Final Decree enjoining the Gazette from discriminatory pricing and attempting to monopolize should have been retained to keep the Haverhill newspaper competition free from unlawful restraints by both parties.

We submit that the holding of the Court of Appeals is in direct conflict with a line of decisions of this Court. *Sugar Institute* v. *United States*, 297 U.S. 553, 599; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-221; *Fashion Originator's Guild* v. *Federal Trade Commission*, 312 U.S. 457, 467, 468; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214.

In *Sugar Institute*, this Court declared that "endeavor to put a stop to illicit practices must not itself become illicit". In *Fashion Originator's Guild*, this Court would not excuse an antitrust violation because it was resorted to as a defense against the tort of style "piracy". Elimination of "competitive evils" was not accepted as a defense in *Socony-Vacuum*. This Court ruled in *Kiefer-Stewart* that, because petitioner may have violated the antitrust laws, it was no defense to its antitrust action against respondents. This language in *Kiefer-Stewart* (p. 214) is apposite here:

> . . . The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by re-

spondents nor immunize them against liability to those they injured.

In support of its holding that to retain its market position the Gazette was justified in discriminatory pricing, the Court of Appeals relied in part on the concurring opinion of Judge Phillips in *Moore* v. *Mead Service Co.*, (C.A. 10, 1951) 190 F.2d 540 (App. A 31, 32). There Judge Phillips stated that the defendant should be permitted to prove that its discriminatory price cutting was only intended to meet the unlawful boycott instituted by plaintiff. Moreover, in note 13 to its opinion in this case, the Court of Appeals stated that nothing in the subsequent history of the *Moore* case indicated that this Court disapproved of the position asserted by Judge Phillips (App. A 31). The entire history of the *Moore* case shows the contrary.

In the *Moore* case, plaintiff, a baker, was about to remove his establishment from a town for lack of business. To prevent this, some of the town's businessmen obtained the agreement of all but one of the town's retail stores to handle only the plaintiff's bread. The agreement, in which plaintiff acquiesced, was to be effective on a date certain. If the agreement went into effect, plaintiff was assured of a virtual monopoly of bread sales in the town. However, before the agreement went into effect, the defendant bakers lowered their bread prices in the town in question while maintaining prices in the remaining towns where they did business. As a result of defendants' discriminatory pricing, plaintiff was forced out of business and brought suit against defendants for violation of Section 2 of the Clayton Act.

The District Court dismissed Moore's suit on the ground that the defendants' discriminatory pricing was justified because of the boycott organized on behalf of Moore. In *Moore* v. *Mead Service Co.*, (C.A. 10, 1950) 184 F.2d 338,

the Court of Appeals affirmed the dismissal for substantially the same reasons which moved the District Court to dismiss. Hence, in this opinion, the Court of Appeals took virtually the same position later maintained by Judge Phillips in his concurring opinion reported at 190 F.2d 540. This Court granted certiorari, but without waiting for a hearing on the merits, remanded so that the Court of Appeals could give the case further consideration in the light of this Court's opinion in *Kiefer-Stewart*. *Moore* v. *Mead Service Co.*, 340 U.S. 994.

On remand, the majority of the Court of Appeals conceded that, although the facts of *Kiefer-Stewart* were somewhat different, *Kiefer-Stewart* was controlling and that Moore's activities as to the boycott did not bar his suit. *Moore* v. *Mead Service Co.*, 190 F.2d 540, 541.

After Moore recovered a judgment at the second trial, it was reversed by the Court of Appeals on the ground that the necessary impact on interstate commerce was not shown. *Mead Service Co.* v. *Moore*, (C.A. 10, 1935) 208 F.2d 777. Again the case reached this Court where the judgment of the Court of Appeals was reversed. *Moore* v. *Mead Service Co.*, 348 U.S. 115. The respondent urged this Court to hold that the attempted boycott in which Moore participated justified the discriminatory pricing by respondent. In dealing with that contention at note 2 on page 118 of 348 U.S., this Court first quoted the language from *Kiefer-Stewart* quoted above and then stated that it need not decide the point because respondent had no ground of complaint since it had been amply protected by the trial court's charge.

Consequently the history of the *Moore* case shows that this Court disapproved resort to violations of the antitrust laws as a defense to similar conduct and hence inferentially disapproved of Judge Phillips' concurring opinion relied on by the Court of Appeals in this case.

Thus here, the Court of Appeals erred in holding that the Gazette was justified in discriminatory pricing practices because it felt aggrieved by acts of petitioner. The Gazette's remedy was recourse to the federal courts, a course which it eventually took in filing its counterclaim.

Question II

The refusal of the courts below to hold that the combination of some New England publishers to form respondent NNE for the purpose of acquiring the stock and directing and financing the operations of the Gazette was a violation of the antitrust laws, is in conflict with decisions of this Court.

There was testimony as to the motives which inspired those who formed NNE to acquire the Gazette. According to the findings of the courts below, many of the NNE stockholders acted because they disapproved of the tactics of the publisher of petitioner and some admitted that they acted because they feared that, if not stopped, petitioner might some day introduce a competing newspaper in their towns. All of the publishers in NNE stated that they were moved to purchase the Gazette in part for investment purposes. The courts below accepted and adopted this testimony. Witnesses for petitioner testified that Haverhill could support two newspapers but all who testified for respondents on the subject stated that Haverhill could support only one newspaper. The respondent testimony on the matter was accepted as true by the courts below. The courts below ruled that the Gazette was in financial distress at the time it was acquired by the respondent publishers and that, in part at least, this distress was caused by the competition of the Journal.

It is, therefore, self-evident that the respondent publishers believed that their investment in the Gazette could

not become a profitable investment so long as the competition of the Journal existed. Since no one knowingly makes an unprofitable investment, it necessarily follows that the respondent publishers intended to exclude the Journal from Haverhill. Thus, accepting the factual findings of the courts below but drawing the logical although different conclusion therefrom, as Rule 52(a) permits,[3] it is inescapable that respondent publishers and NNE demonstrated the exclusionary intent prohibited by Section 2 of the Sherman Act. Here was a clear attempt to monopolize the Haverhill newspaper market. The contrary rulings of the courts below are in conflict with the declarations of this Court on intent in attempted monopoly cases. *Swift & Co.* v. *United States*, 196 U.S. 375, 376; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 531, 532; *Lorain Journal* v. *United States*, 342 U.S. 143, 152.

In addition to the so-called "narrow" Haverhill market, this case involved also a wider market. That wider market comprised the New England towns where respondent publishers distributed their newspapers. Petitioner claimed that the action of the publishers in the wider market was in violation of Section 2 of the Sherman Act and Section 7 of the Clayton Act.

The District Court rejected out-of-hand that there was any wider market involved and that any violation of the antitrust laws was committed by the publishers (R.A. 1100-1101, 1369). On the other hand, the Court of Appeals agreed with petitioner's legal theory and indicated that if petitioner had introduced sufficient evidence as to the extent and nature of the wider market, it might have made out a case under either Section 2 or Section 7 (App. A 36).

In this latter connection, the Court of Appeals over-

[3] Federal Rules of Civil Procedure, Rule 52(a). See *Orvis* v. *Higgins* (C.A. 2, 1950) 180 F.2d 537, cert. den. 340 U.S. 810; *E. F. Drew & Co.* v. *Reinhard* (C.A. 2, 1948) 170 F.2d 679, 683-684.

looked the fact that at a pre-trial conference the District Court forbade petitioner to introduce evidence as to the wider market (R.A. 1369). The District Court enforced this order at trial (R.A. 163, 164). Thus if the Court of Appeals is correct that a further showing as to the wider market might have produced a different result, then the case should be remanded to the District Court to give petitioner its first opportunity to do so.

However, petitioner submits that, although introduced for other purposes, there was sufficient evidence in the case and sufficient findings made by the District Court to require the legal conclusion that some of the respondent publishers did attempt to monopolize the wider market in violation of Section 2 of the Sherman Act.

Thus it was found that respondent publishers distributed newspapers in New England communities and that all but one of them published the single newspaper in their communities. It was also found that some of the publishers acquired the Gazette out of fear that petitioner might invade their towns. The other publishers heard this potential competition discussed at joint meetings. It would be the natural, almost the inevitable, inference that all of the respondent publishers in the one newspaper towns acted in Haverhill to deter petitioner from a similar invasion of their areas. It is the necessary inference that those who expressed their fear of petitioner's competition acquired the Gazette for that purpose.

Hence, at least some of the respondent publishers demonstrated an intent to prevent petitioner from competing in their monoploy towns. They should have been enjoined from acting to prevent petitioner from reaching this wider market for, as this Court said in *United States* v. *Griffith*, 334 U.S. 100, 107, "The antitrust laws are as much violated by the prevention of competition as by its destruction."

The Court of Appeals seemed to take the position that

the publishers could not violate Section 2 of the Sherman Act or Section 7 of the Clayton Act in so far as the wider market was concerned unless a competitor actually started to publish a newspaper in their towns. The Court of Appeals stated that it could not "invent" a competitor (App. A 37). The factual answer to that is that the respondent publishers recognized petitioner as their potential competitor. It was petitioner's competition which they sought to forestall. Having such an intent and enjoying a monopoly, they offended Section 2 of the Sherman Act even though petitioner had not begun publication in their towns.

We submit also that the respondent publishers violated Section 7 of the Clayton Act under a proper construction of that section. First the acquiring publishers do not come within the saving exception of Section 7 because they did not purchase the Gazette "solely" for investment. They had other more dubious motives as well.

Secondly, it was not necessary for petitioner to show, as the courts below assumed, that respondents had lessened actual competition of petitioner in the wider market. It was sufficient, as petitioner did show, that some at least acquired the Gazette for the purpose of keeping petitioner out of their areas. Surely the purchase of the Gazette, accompanied by such an intent and in the context of the purchasers' subsequent direction of the struggle against petitioner in Haverhill, must be considered an acquisition which in reasonable probability may tend to lessen petitioner's competition in the wider market and thus be one offensive to Section 7.

The courts below construed Section 7 in the strict fashion repudiated by this Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592, where it was said:

> We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly in any line of commerce.

Hence the judgment of the Court of Appeals should be reviewed to determine whether appropriate injunctive relief against the acquisition and retention of the Gazette should have been issued or whether, in the light of the Court of Appeals opinion and the District Court's foreclosure of petitioner's introduction of evidence as to the wider market, the case should have been remanded to the District Court for the taking of further evidence.

By reason of the foregoing, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Dated: January 17, 1961

APPENDIX A

United States Court of Appeals

For the First Circuit

No. 5619.

UNION LEADER CORPORATION,

APPELLANT,

v.

NEWSPAPERS OF NEW ENGLAND, INC., ET AL.,

APPELLEES;

No. 5620.

THE HAVERHILL GAZETTE COMPANY,

APPELLANT,

v.

UNION LEADER CORPORATION,

APPELLEE.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS.

[180 F.Supp. 125]

Before GOODRICH, HARTIGAN and ALDRICH, *Circuit Judges.*

Arthur Howard Bloomberg, with whom *Phister and Judge* was on brief, for Union Leader Corporation.

Robert H. Goldman, with whom *Frank Goldman, Joseph F. Buciga lupo* and *John J. Ryan, Jr.*, were on brief, for Haverhill Gazette Company et al.

John F. Groden, Charles C. Worth, and *Withington, Cross, Park & McCann* on brief submitted by Philip S. Weld and Essex County Newspapers, Inc.

OPINION OF THE COURT.

December 2, 1960.

ALDRICH, *Circuit Judge.* In this private antitrust action the plaintiff, Union Leader Corporation, alleged violations

of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1 and 2, by defendants Newspapers of New England, Inc. (NNE), NNE's component members and The Haverhill Gazette Company, and violations of section 7 of the Clayton Act, 15 U.S.C. §18, by NNE. (In the course of the opinion we shall refer simply to section 1, section 2, or section 7.) In a counterclaim the Gazette alleged violations of sections 1 and 2 by Union Leader. Except for its claim against the Gazette the plaintiff was unsuccessful in all respects. It appeals, as does Gazette. Both here and below the parties, not surprisingly, have had their difficulties in taking courses which avoid both Scylla and Charybdis.[1] Although we have reviewed all claimed errors, we will say at the outset that we find no reason to pause over any attack, consistent or inconsistent, upon the court's findings or rulings except in so far as they concern three areas of conduct—certain joint activity of Union Leader and the printers' union; actions by Gazette claimed by it to be purely defensive; and the formation of NNE and its purchase of the Gazette.

In November 1957 the Gazette published the only daily newspaper in Haverhill, Massachusetts. Similarly, in Manchester, New Hampshire, some 28 miles from Haverhill, the single daily newspaper was published by the Union Leader, operated by one Loeb. On November 20, 1957, a strike was called by the Gazette's printers. The paper was out of publication for three days, when operation was resumed with nonunion printers. The district court found that there was strong union sentiment in the city of Haverhill, and that during the strike circulation and advertising fell off by fifty per cent. On November 30, 1957, six Haverhill merchants (subsequently increased to eight; and here

[1] The orders to the helmsman were clear enough. "The Court should avoid creating by implication inharmony between different parts of the same opinion which are capable of reconciliation." (Union Leader's brief in No. 5620.)

inafter referred to as the merchants), visited Loeb in Manchester to urge him to publish a Haverhill shopper[2] in which they could place Christmas advertising without giving offense to the union. Loeb acceded. Publication of the Haverhill Journal followed on December 5 and December 12. Encouraged by the favorable reception, Loeb announced in the second issue that he would publish as a regular daily, and commenced doing so on December 16. Active competition between the Journal and the Gazette has occurred ever since in what was described by the court as a "life-and-death struggle."

The court found that by nature of circumstances Haverhill is a one-paper area. Prior to the events leading to this case both the Gazette and the Union Leader enjoyed what might be termed "natural" monopolies, as cities of the size in which they operate cannot support two good daily newspapers under present-day conditions.[3] The court found that each paper came by its monopoly position in a lawful fashion, and correctly ruled that neither had "monopolized" in violation of section 2. A monopolist does not violate the act if the monopoly is "thrust upon it." *United States* v. *Aluminum Co. of America*, 2 Cir., 1945, 148 F.2d 416, 429. "A market may, for example, be so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand." *Id.* at 430. See *United States* v. *E. I. du Pont de Nemours & Co.*, 1956, 351 U.S. 377, 391-93. No change, of course, was effected by Union Leader's

[2] A shopper, also known as a throwaway, is a newspaper containing principally advertising which is distributed free, and without request, at doorways.

[3] In Massachusetts, Boston and Lynn are the only cities with more than one paper (excluding morning and evening by the same publisher). This phenomenon, of course, is not restricted to Massachusetts. See *Times-Picayune Publishing Co.* v. *United States*, 1953, 345 U.S. 594, 602-03 & n. 13.

publication of the Journal. It was a foregone conclusion that if successful the Journal would eventually drive the Gazette out of business, and, naturally, Union Leader proposed to succeed. But intending the natural consequences of acts which are in all respects lawful, does not constitute the "exclusionary intent" that is a prerequisite for finding a violation of section 2. In other words, a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it.[4] In either event, there must be some affirmative showing of conduct from which a wrongful intent can be inferred. See *United States* v. *Griffith*, 1948, 334 U.S. 100, 105-08; *United States* v. *United Shoe Machinery Corp.*, D.C.D.Mass., 1953, 110 F.Supp. 295, 297, 341, *aff'd*, 347 U.S. 521.[5] The court found that such an affirmative showing had been made with respect to both Union Leader and Gazette.

Commencing chronologically, it was admitted that Loeb hired some of the Gazette's striking printers to distribute the shopper. The court found that this was done to inform

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[4] An interesting speculation might be whether the antitrust laws were intended to protect one natural monopolist against another, in view of the fact that there was no competition before the battle began and there would be none afterwards. Both parties flirt with this thought when the purpose serves. Since these laws are concerned primarily with the public interest, *Associated Press* v. *United States*, 1945, 326 U.S. 1, 17 n. 16, *reh. den.*, 326 U.S. 802; *International Shoe Co.* v. *FTC*, 1930, 280 U.S. 291, 298, it may be that they would not be involved if, for instance, the product provided by either party would be the same. However, we cannot say that it could not be in the public interest to have one newspaper rather than another. Where there is no identity of performance we will not say that the public does not have an interest in competition even though that competition be an elimination bout.

[5] We agree with the court that the use of financial resources alone was not such an exercise of the Manchester "monopoly power" in Haverhill as would imply an intent by Union Leader wrongfully to exclude its competitor. *Cf. United States* v. *Griffith*, *supra* at 107-09. By the same token Union Leader's criticism of NNE's financial strength is ill-founded.

the public that the shopper had the union's support. More serious is its finding that union representatives accompanied the shopper's advertising solicitors and "asked merchants not to advertise in the Gazette, and simultaneously advertising solicitors of Union Leader asked these merchants to advertise in the Journal."[6] Union Leader contends that the court's ruling that this produced a group boycott (a per se violation of section 1, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 1959, 359 U.S. 207), as distinguished from a mere appeal or attempt to create one, was without adequate findings, and that the only economic boycott possible was by advertisers and not the union[7] or Union Leader.[8] This question is academic because, whether or not the advertisers responded with a boycott, we agree with the court's conclusion that Union Leader's part in the appeal demonstrated an intent to exclude competition unlawfully in violation of section 2.[9]

[6] It is true that after the Journal became a daily these practices were discontinued. But it must have already become apparent that the Journal was in the union's picket line. Union Leader's present position may be illustrated by its argument that the shopper which was absorbing Gazette's advertising "was not in the same market with the Gazette." Almost as strained are its contentions based on testimony that it is economically justifiable to advertise in only one of two competing papers. This testimony fell far short of suggesting the reverse, that it was economically unjustifiable to advertise in both.

[7] We expressly disclaim any approval of the court's citation of *Allen Bradley Co. v. Local No. 3, Int'l Bhd. of Elec. Workers*, 1945, 325 U.S. 797, *reh. den.*, 326 U.S. 803. We are not required to decide whether the union violated the antitrust law, and so need not consider the very difficult problem of where labor's immunity to antitrust prosecution ceases.

[8] The court expressly found that Union Leader did not come into Haverhill originally at the union's request. Therefore, it might be questionable whether the joint appearance of union and Union Leader representatives put any pressure on an advertiser to use only the Journal beyond that which already existed from the mere coincidental facts that the Gazette was being struck and the Journal provided alternative newspaper advertising on a roughly equivalent basis. But even if in fact it added no pressure, this would not undermine the court's finding that such pressure was wrongfully intended.

On December 8 the merchants met again with Loeb, and for some time three meetings were held each week. At the date of trial these meetings were being held weekly. The court found that there was a general understanding not only that the concerns which these merchants represented would not advertise in the Gazette, but that they would seek to induce others to advertise exclusively in the Journal. It further found that when the strike was settled the "interest" of these merchants slackened, and that Loeb thereafter paid each of them $50 a week (subsequently increased by promises, contingent upon the Journal becoming the only newspaper in Haverhill, of "massive" payments totaling $150,000 apiece over a period of years, plus an overriding bonus). The existence of these payments and promises were kept secret. Accordingly, it was not known to other advertisers and prospective advertisers, who thought the merchants were *bona fide* gratuitous endorsers of the Journal and opponents of the Gazette. The court held that this was a group boycott and, thus, a per se violation of section 1, and an unfair practice, not honestly industrial, and, thus, conclusive evidence of the exclusionary intent proving a violation of section 2.

We confess an inability to understand the basis of the Union Leader's appeal on this question.[9] See *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra; Lorain Journal Co. v. United States*, 1951, 342 U.S. 143.

Substantial competition immediately developed between the Journal and the Gazette with respect to advertising rates. The court found that the Journal resorted to

[9] Union Leader describes these merchants as "honor-bound to support it," and states that it was "prudent . . . to engage outside help" and that obtaining "local advice . . . is so normal and much practiced in so many businesses that it has become a standard business technique." Seemingly, the contention is that the court's finding that Loeb was paying for something more than proper advice was plainly wrong. We have no inclination to agree.

"private concessions," that is to say, secret discriminatory rates. It held this to be an unfair practice evincing an exclusionary intent. In the light of other demonstrations of Union Leader's wrongful intent, no discussion of this finding is needed. *Cf. United States* v. *Griffith*, *supra*, at 109. This disposes of Union Leader's appeal from the judgment against it on the counterclaim. The balance of this opinion will deal with the complaint.

As a result of the strike and the Journal's competition, the Gazette incurred serious and continuous losses.[10] The settling of the strike by no means put an end to this, and by the fall of 1958 it found itself in danger of insolvency. It adopted various means to combat the Journal's competition. One of these was secret rate discrimination. Believing this indistinguishable from what it had held concerning Union Leader's similar discriminations, the court ruled[11] that this was a violation of section 2. The Gazette contended that its conduct was purely defensive, and was, at most, only evidence of a wrongful intent. The court rejected this claim, for a reason we believe to be unsound. After stating that price discrimination is "not to be excused because comparable practices were indulged in by plaintiff," it said,

> "Nor, on the ground that the motive was to retaliate or defend against Union Leader's illegal conduct, can the practice be regarded as merely a restraint of trade of doubtful validity rather than as

[10] The case comes before us after trial on all issues except damages. The court accordingly made no finding as to what portion of this loss would have resulted simply from the strike without the competition to which this opinion is addressed. We have no doubt that both contributed.

[11] We have examined the court's opinion in the light of the conflicting analyses made by the parties and agree with Gazette that the word "compels" as used by the court indicated a ruling of law and not a finding or conclusion of fact.

an attempt to monopolize. This distinction is unacceptable because having about fifty per cent of the market, and knowing that the market would not permit two contestants to survive, Gazette's resort to any unfair practice, and its failure to confine itself to exercise of skill, foresight, and industry, compels a conclusion that Gazette had an exclusionary intent and had attempted to monopolize the market in violation of §2 of the Sherman Act."

In calling this an "unfair practice" the court assumed the point. For, as we conceive the issue, the practice was "unfair" if conducted with an intent to monopolize, but it was fair if it was intended only to resist deterioration of its own position brought about by Union Leader's unlawful activities.

It is now clear that a plaintiff's own antitrust violations do not bar its successful maintenance of a private antitrust action. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 1951, 340 U.S. 211, *reh. den.*, 340 U.S. 939; *Moore* v. *Mead Service Co.*, 10 Cir., 1951, 190 F.2d 540, *cert. den.*, 342 U.S. 902.[12] Nor can the use of unfair methods by a competitor automatically justify adopting comparable unfair methods. *FTC* v. *A. E. Staley Mfg. Co.*, 1945, 324 U.S. 746, 753. However, it does not necessarily follow that a competitor's violations cannot constitute a circumstance to be considered in determining whether the defendant's conduct was in fact a violation. To the extent that a party has merely sought to offset the other's illegal acts it has not acted with a wrongful intention, nor should its conduct result in public injury. In such a case there would be no

[12] On remand for trial, *held*, for plaintiff, D.C.D.N. Mex. (unreported), *reversed*, *Mead's Fine Bread Co.* v. *Moore*, 10 Cir., 1954, 208 F.2d 777, *reversed and district court affirmed*, 1954, 348 U.S. 115, *reh. den.*, 348 U.S. 932.

reason to encourage recovery by the original offender, and every reason not to. In the *Moore* case, *supra*, Judge Phillips, specially concurring, stated that the defendant should be permitted to prove that its discriminatory price cutting was only intended to meet the unlawful boycott instituted by the plaintiff and so to retain its market position. 190 F.2d 540, 542.[13] The Supreme Court reflected the same reasoning in *Times-Picayune Publishing Co.* v. *United States*, 1953, 345 U.S. 594, 623, when it said, "'[A]n unlawful trade practice may not be justified as an emulation of another's illegal plan. . . . But that factor is certainly relevant to illuminate ambiguous intent, particularly when planned injury to that other competitor is the crux of the charge.'" We do not think the fact that competition is in a natural monopoly climate can limit a defendant's right to defend itself. We have already pointed out that Union Leader was not restricted by this circumstance. What is sauce for the goose is sauce for the gander, and, while there may be two different flavors, the stock is the same. In the one situation we have recognized that entry into a monopoly market without more does not taint otherwise legal conduct; now we are saying that the existence of such a market cannot circumscribe conduct which might otherwise be justified as defensive. Essentially, we refuse to permit the inevitable monopoly to give either competitor a fortuitous advantage. However, contrary to this, the court ruled, in effect, that a company which resorts to unfair practices in its attempt to win a natural monopoly area will be less open to repulse than one which enters a normal competitive field.

In his concurrence in the *Moore* case, Judge Phillips cautioned that to establish this defense a defendant must

[13] Nothing in the subsequent history of the *Moore* case, see n. 12 *supra*, suggests Supreme Court disapproval of this.

demonstrate that its prima facie violations[14] do not extend to a degree where they affirmatively indicate an attempt to create a monopoly. 190 F.2d at 542. This does not mean that a defendant will be held to nice calculations as to just how much resistance is called for, *cf. Brown* v. *United States*, 1921, 256 U.S. 335, 343; *United States* v. *Jasper*, 4 Cir., 1955, 222 F.2d 632, 633; *Dupre* v. *Maryland Management Corp.*, 1954, 127 N.Y.S.2d 615; *Klein* v. *John Stuart, Inc.*, 1954, 136 N.Y.S.2d 830, but nonetheless there may be a question of fact. In setting aside a decision in favor of Union Leader because of an erroneous ruling, we would normally remand to permit the court to determine this issue. However, we think it has been resolved by the subsidiary findings which the court has already made. In the course of ruling that this method of defending itself was foreclosed, the court stated that "in giving these discriminatory benefits, Gazette was acting only after it had been put in peril of insolvency in the equity sense as a result of Union Leader's attempt to monopolize.[15] . . . Admittedly the provocation to retaliate was great, the total number of discriminations was not shown to be large, [and] the period of the discrimination was short. . . . " We cannot read the opinion without concluding that but for its belief that it was precluded from doing so the court would have found in favor of Gazette. Indeed, we believe any other finding would have been clearly erroneous.[16]

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[14] The case for Gazette here seems in some respects stronger than the one considered by Judge Phillips. There the defendant was called upon to justify conduct which the statute expressly prohibited. 15 U.S.C. §13. In the present case the defendant merely has to rebut an inference of a wrongful intention drawn from particular actions.

[15] Or, as Union Leader itself states in its brief with reference to this period, "Gazette's financial condition was such that it could not continue much longer."

[16] The practical necessity of Gazette's adjusting rates in order to maintain its position is made plain by Loeb's own testimony. He stated that "this matter of the rates . . . goes to the very heart of any news-

One issue remains. Within a few months of establishing the Journal, Loeb commenced overtures looking to the purchase of the Gazette. By the fall of 1958 that paper was in such circumstances that its stockholders felt unable to continue. Not unnaturally, they were not eager to sell to Loeb. The Gazette was a member of a non-profit trade association whose members included about 80 of some 98 daily newspapers published throughout New England. Loeb was a former member. One of the purposes of the association was to give assistance (other than financial) to members in case of strikes. Many members were indignant with Loeb for taking advantage of and adding to the Gazette's difficulties, and considered his conduct both unethical and unlawful. At first some offered loans, but these were declined. When it was learned that the owners might have to sell, a number of the members jointly agreed to match Loeb's current offer. Their offer was accepted. As a result Newspapers of New England, Inc., was formed, and the Gazette stock was acquired in December 1958. NNE's principal shareholders were the local papers or individual publishers in Lowell, Lawrence, and Burlington, Vermont (in whose area Loeb published a competing paper), the balance being other small daily newspapers in various cities or the publishers of such. The court found that "every" shareholder acted in part because he believed that "the investment was commercially justified"; that "many" acted in part because they did not approve of Loeb's tactics; that "some" acted in part because they sympathized with the owners of the Gazette and feared

paper's survival." Elsewhere he testified that a serious consequence of secret discriminatory advertising practices—once it is known that they are indulged in—is that it enables an unscrupulous advertiser to play one paper against the other. A merchant who has not been offered a special rate-cut by one paper can nonetheless tell the other that he has been, and that other, knowing the first paper does do such things, fears to disbelieve him, and must match the price in order not to lose the customer.

that they "might at some time be victims of similar distress," and "'if Loeb succeeded in Haverhill . . . then he . . . might . . . come into their territories.'" (Omissions are the court's.) The court added that there was "no basis for concluding that [a noninvestment] motive was primary in any shareholder's decision."[17] It further found that there was no commitment, "express or implied, . . . legal or . . . moral," that any shareholder would come to the aid of any other shareholder in the future if some similar occurrence threatened him. On the basis of this last finding it held that there was no combination or conspiracy to act other than in Haverhill. In addition, it held that there was no unlawful conduct in Haverhill itself. Examination of the record does not persuade us that the findings of fact are plainly wrong. However, we believe the legal issues are somewhat more complex than the court regarded them.

Union Leader's attack on NNE is in two parts, the first being the effect on competition in Haverhill, or what it terms the "narrow" market. As we noted at the beginning, section 7 of the Clayton Act,[18] as well as sections 1 and 2 of the Sherman Act, are involved here. Union Leader complains that it would have succeeded in purchasing the Gazette, or otherwise have successfully culminated its competition, but for NNE's appearance; that "the fact that the stockholders of the Gazette were forced to sell out estab

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[17] It is not clear whether the purpose of this finding was to bring NNE within the investment exception of section 7, *infra* n. 18, but we think the previously quoted finding would preclude this.

[18] ". . . . No corporation shall acquire, directly or indirectly, the whole or any part of the stock . . . of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly. This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition . . ." 15 U.S.C. §18.

lishes that the appellant possessed the . . . requisites for effective competition and victory," and that "a battle in which there are over thirty newspaper owners on one side against the appellant standing alone . . . hardly suggests a fair fight." However euphonious this melody, Union Leader's attempted treble does not harmonize with its bass accompaniment. A party who pursues an unlawful course of conduct from the moment it appears on the scene is in a poor position to complain of an unfair fight. The more particularly is that so in this case in that NNE, apart from being there at all, was guilty of no unlawful competitive practices.

We readily agree with the district court with respect to the "narrow" market. Section 1 creates no impediment simply because NNE was comprised of a number of individual newspapers. Combinations are not unlawful per se. Union Leader's real objection is to the superior financial resources of the group. But we have never heard of a principle that a corporation having affluent shareholders could not compete. In reality, Union Leader is attempting to relight the *ignis fatuus* over competition in a monopoly area. If Union Leader could enter and was not prevented from using its funds acquired in a monopoly market, supplemented, as it developed, by outside loans, we see no reason why its potential rivals should be subject to greater restrictions. Nor does the fact that an acquisition was involved automatically lead to a section 7 violation. If competition is doomed by market conditions, it cannot be "lessened" by a change of ownership.

A different question arises under sections 2 and 7 with respect to the second part of Union Leader's complaint, regarding what it calls the "wider market."[19] It contends that any area in which individual papers who became share-

[19] We do not reconsider section 1 here as it falls if the others do.

holders of NNE are now doing business is a market of entry, and that the acquisition of Gazette's stock for the purpose of defeating Union Leader's Haverhill venture was for the purpose of protecting those areas from similar encroachments. An ounce of prevention is worth a pound of cure. See *American Tobacco Co.* v. *United States*, 1946, 328 U.S. 781, 797; *cf. Gamco, Inc.* v. *Providence Fruit & Produce Bldg., Inc.*, 1 Cir., 1952, 194 F.2d 484, 488, *cert. den.*, 344 U.S. 817. We cannot agree with the district court that there could be no proscribed activity here because there was nothing but a number of narrow markets in each of which a shareholder was "king," and hence no "combined market power." *Cf. United States* v. *Bethlehem Steel Corp.*, D.C.S.D.N.Y., 1958, 168 F.Supp. 576, 600. On the contrary, in whatever measure any shareholder was concerned in protecting its own narrow market, it was aided by others similarly situated. To this degree we see a wider market and the possibility of an illegal transaction.

It is clear, as the court found, that some shareholders were interested in Loeb's getting his "comeuppance." The court's observation here that "the law allows other joys in business life beside making money," obviously must be limited to personal satisfactions less tangible than the elimination of competition. If one of NNE's motives was an intent to monopolize in the home areas of its stockholders, section 2 has been violated; or, if there was, as a probable result of teaching Loeb a lesson, a substantial depressant upon competition in such areas, section 7 has been violated. In either case NNE's purchase of the Gazette would have to be regarded as unlawful.

Giving fullest play to the evidence and the court's opinion, we cannot find that opposition to Loeb was anything more than opposition to his methods. Union Leader produced no evidence that the shareholders feared competition as such, or had any reason to. As one witness

put it, competition "is not economically possible, . . . the likelihood of anyone's trying to do it is remote." In twenty years only two newspapers had been started in New England. The one other than the Journal had failed immediately. We will not hold that a desire to prevent unlawful competition is evidence of an improper or monopolistic intent. Conversely, approaching the transaction from the standpoint of a potential competitor, we feel equally that there is no evidence of a tendency "substantially to lessen [lawful] competition" under section 7. The court dealt with the possible effect on any future competition by pointing out that there was no agreement between the shareholders, express or implied, that they would act again in any future situation. We agree with Union Leader that this is not determinative. Arguably, a potential competitor, though knowing that in Haverhill NXE was formed to meet an unfair competitor, might be dissuaded by a fear that mutual self-interest would bring into play the same kind of joint resistance no matter how lawfully he acted. But we cannot invent such a competitor and assume he would so think. *Cf. United States* v. *Columbia Steel Co.*, 1948, 334 U.S. 495, 528, *reh. den.*, 334 U.S. 862. Union Leader must show a "reasonable probability" that an adverse effect on competition is "likely" to result. See *United States* v. *E. I. du Pont de Nemours & Co.*, 1957, 353 U.S. 586, 589. It has not shown even a reasonable possibility that competition is likely to exist, much less that such competition would be adversely affected. We cannot disagree with the court's conclusion that none of the component newspapers had appreciably increased its power to control prices and production as a result of participating in the NXE purchase of the Gazette. Consequently, we hold that the court did not err in rejecting Union Leader's contentions that NXE had violated sections 1, 2, and 7.

Judgment will be entered striking paragraphs 2, 6 and 8 from the partial final decree, as amended December 30, 1959, of the district court, and amending paragraph 10 thereof so that the phrase "paragraphs 6 and 7" therein shall read "paragraph 7," and otherwise affirming said decree.

APPENDIX B

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1 so far as pertinent:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2 so far as pertinent:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 7 of the Clayton Act, 15 U.S.C. § 18 so far as pertinent:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Com-

mission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to creat a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extentions thereof, or from owning the holding all or a part of the stock subsidiary corporations, when the effect of such formation is not to substantially lessen competition. . .

Section 16 of the Clayton Act, 15 U.S.C. 26, so far as pertinent:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in

any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that a danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . .

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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 658.

UNION LEADER CORPORATION, *Petitioner*,

v.

NEWSPAPERS OF NEW ENGLAND, INC., ET AL., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF IN OPPOSITION FOR ALL RESPONDENTS (EXCEPT RESPONDENTS PHILIP S. WELD AND ESSEX COUNTY NEWSPAPERS, INC.)

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Opinions Below.

The opinion of the District Court is reported at 180 F. Supp. 125. The opinion of the Court of Appeals (Appendix to Petition 23-38) (hereinafter referred to as A.P.) is unreported as yet.

Jurisdiction and Statutes Involved.

See Petition, pp. 2, 3.

Introductory Note.

The petitioner seeks no review on certiorari and sets forth no questions and makes no contentions with respect to the findings of fact and conclusions of law of the District Court, affirmed by the Court of Appeals, holding that the petitioner engaged in illegal violations of the Sherman Act, in its relations with representatives of a Union, with the eight Merchants, and in Union Leader Corporation's[1] secret advertising discriminations. In accordance with Rule 23 1 (c), of the Rules of this Court these points are not considered by this Court with respect to the granting of certiorari. See also *Irvine* v. *California*, 347 U.S. 128, 129; *Lawn* v. *United States*, 355 U.S. 339, 362-363 (footnote). Further, in stating the "Questions Presented" (pp. 2-3) and "Reasons for Granting the Writ" (p. 12) the petitioner does not formally set forth any conflict with decisions of this Court or any other usual reason for granting certiorari set forth in Rule 19 of the Rules of this Court.

Questions Presented.

I. Should this Court entertain this petition, which seeks to review the decision of the Court of Appeals with respect to its conclusion that, in a narrow market, where two newspapers are competing, and economically the existence of only one newspaper is feasible, the mere giving by the first newspaper (Gazette) of certain discriminatory benefits, not on the published rate card, not shown to be large, to some advertisers for a short time, the first newspaper act

[1] Hereinafter sometimes referred to as U.L.Co. Haverhill Gazette Company is hereinafter sometimes referred to as H.G.Co. Newspapers of New England, Inc., is hereinafter sometimes referred to as N.N.E.

ing *only after* it had been put in peril of insolvency in the equity sense by the illegal conduct and attempts to monopolize of the second newspaper (Journal), including the giving of discriminatory benefits, and where the first-mentioned benefits were given without any promise on the part of the recipients to cease or reduce advertising in the second newspaper, and the second newspaper was found to be the aggressor in the competition, and the first newspaper was acting purely defensively to offset the second newspaper's illegal acts—the first newspaper did not have an illegal exclusionary intent and was not attempting to monopolize in violation of section 2 of the Sherman Act; and where there is no conflict between such decision of the Court of Appeals and those of this Court or other Courts of Appeals?

II. Should this Court review the dismissal on the merits by the trial Court and the affirmance thereof by the Court of Appeals of petitioner's complaint where there was ample evidence to support the findings of fact of the trial Court, affirmed by the Court of Appeals, which were therefore not plainly wrong or clearly erroneous, and where the Court of Appeals did not disagree with the trial Court's conclusion that none of the respondents (who included corporations and individuals who were respectively publishers of or interested in separate natural monopoly newspapers in separate local markets outside of Haverhill, and who formed N.N.E., which purchased all the stock of H.G.Co., a corporation publishing The Haverhill Gazette, a newspaper existing for over one hundred and twenty-five years in Haverhill, a natural monopoly market) had an intent to monopolize or had attempted to monopolize in violation of section 2 of the Sherman Act, and where the petitioner had failed to introduce evidence and to show, as required by decisions of this Court, any reasonable probability that any adverse effect on competition in violation of section 7 of the Clayton Act would result from the

formation of respondent N.N.E. and its purchase of the stock of H.G.Co., whether the market was a stipulated relevant Haverhill market or some supposed theoretical but unproven "wider market," where—

(*a*) H.G.Co. had been driven to the verge of insolvency in the equity sense as a result of the illegal attempts of petitioner, who started the Haverhill Journal as a rival newspaper to the Gazette when the Gazette was strike-bound;

(*b*) The N.N.E. stockholders were in effect invited by H.G.Co. to make a bid for its stock so that stockholders of H.G.Co. would not be forced to make a sale they did not want to make to U.L.Co.;

(*c*) All the stockholders in N.N.E. believed, and reasonably so, that the investment was commercially justified;

(*d*) Many of the N.N.E. stockholders individually, as a partial motivation, disapproved of the petitioner's predatory tactics; and some feared that they might be victims of a similar distress to that of the Gazette;

(*e*) The N.N.E. stockholders acted strictly *ad hoc* in the above situation and contemplated no similar ventures in the future; and there was no business linkage between them, nor is any contemplated;

(*f*) N.N.E. and its stockholders engaged in no unlawful competitive practices whatsoever; and

(*g*) There was neither evidence nor any finding that the petitioner or any one else intended to enter the respective separate local markets of shareholders of N.N.E.—

and where there is no conflict between the decision of the Court of Appeals and those of this Court or of other Courts of Appeal?

Counter-Statement of the Case.

Although, as pointed out *supra* (p. 2), the petitioner has waived the further consideration on certiorari of those parts of the opinion of the District Court and the Court of Appeals finding petitioner guilty of illegal violations of the Sherman Act with respect to its conduct with eight Merchants, with representatives of a labor union, and as to advertising discriminations, it is still proper to set these forth herein. The opinion of the Court of Appeals with respect to dismissing the petitioner's complaint against the respondent H.G.Co., and in striking out of those paragraphs of the decree of the District Court with reference thereto, shows that it is necessary to consider the violations of the petitioner. These violations form the background to help determine the intent of H.G.Co. with respect to its alleged advertising discriminations, such intent and action of H.G.Co. having been found to be lawful by the Court of Appeals, and H.G.Co. having been found to have been "acting *only* AFTER it had been put in peril of insolvency in the equity sense as a result of U.G.'s attempt to monopolize." (Emphasis supplied.)

The City of Haverhill, Massachusetts, is what is known economically as a one-newspaper city. The market cannot support profitably two high-grade local daily newspapers (R. 1068-1069, 1094-1095).[2] Apparently the petitioner does not here contend that such a finding is "plainly wrong" or "clearly erroneous."

Prior to December, 1957, the Haverhill Gazette (Gazette), owned by the Haverhill Gazette Company (H.G.Co.), after more than one hundred and twenty-five years of publication, was the only local newspaper in Haverhill (R. 1068).

On November 20, 1957, a strike of printers, members of the International Typographical Union (I.T.U.), con-

[2] Volumes I and II of the Record Appendix are referred to as "R.", volume III as "R. III."

menced at the Gazette (R. 1069). This strike has been held to be illegal by the Court of Appeals (*International Typographical Union* v. *National Labor Relations Board*, May 10, 1960, 278 F. 2d 6 (C.A. 1).

On November 30, 1957, certain Haverhill merchants (Merchants) formed a group and met with William Loeb, the president, majority stockholder and dominant figure in Union Leader Corporation (U.L.Co.), which published the Manchester Union Leader in Manchester, New Hampshire (a paper which had no local competition), and another Sunday paper in Manchester (R. 1069-1070).

They requested that U.L.Co. publish a free throwaway shopper to carry their advertisements and those of any others who wished to avoid patronizing the Gazette during the strike (R. 1069-1071).

At about the same time members of the striking I.T.U. were urging that U.L.Co. enter Haverhill (R. 1075).

On December 5 and 12, 1957, U.L.Co. published a throwaway shopper (R. 1071). U.L.Co. hired some of the strikers to distribute the shopper to let the public know that the Union was supporting U.L.Co.'s newspaper (R. 1076).

On December 16, 1957, U.L.Co. began the publication of a daily, the Haverhill Journal (Journal) (R. 1071). Previously representatives of the Union and representatives of the Journal went to prospective advertisers and requested them not to advertise in the Gazette but instead to advertise in the Journal (R. 1076). (There was undisputed evidence that the Union pickets also carried signs in front of the Gazette Building stating: "Buy the Journal" (R. 1309, 1311, 882, 883).) This was in effect a joint appeal by the Union and U.L.Co. to boycott the Gazette (R. 1091). The trial Court found that such a group boycott organized by U.L.Co. was a *per se* violation of section 1 of the Sherman Act, was conclusive evidence of an intent

to exclude competition unlawfully, and proved that U.L.Co. attempted to monopolize in violation of section 2 of the Sherman Act (R. 1091).

The Court of Appeals stated in its opinion that it was "academic" whether or not a boycott actually occurred, since it agreed with the trial Court's conclusion that at the least U.L.Co.'s part in the appeal demonstrated an intent to exclude competition unlawfully in violation of section 2 (A.P. 27).

Commencing December 8, 1957, the group of Merchants (who then or shortly thereafter had grown from six to eight (R. 1071)) commenced meeting at least once a week at Loeb's home (R. 1072). These Merchants were "so-called consultants" of U.L.Co. (R. 1092). Loeb discussed with them at these meetings, among other things, advertising and general newspaper policy (R. 1072), but the Merchants were in no sense a cross-section of informed Haverhill opinion (R. 1092). None of the Merchants had any experience in the newspaper business (R. 1071). The Merchants assured Loeb that they would support the Journal with their advertising, and would aid in securing others to support the Journal (R. 1072). Thenceforth they did so, and gave, with two insignificant exceptions, all their advertising to the Journal and none to the Gazette (R. 1071, 1073). Aside from a $15 advertisement (R. 1073), the other exception was that one merchant did put a single advertisement in the Gazette, but was criticized by the group upon the ground that he should not have put an advertisement in the Gazette (R. 1073).

During the period December 5, 1957, to September 15, 1959, such advertising in the Journal amounted to over $92,000 (R. 1073). In the past their advertising in the Gazette had been substantial and amounted to "at least" 5% of the total local newspaper advertising of Haverhill merchants (R. 1071-1072).

The Gazette's advertising rates had been published on September 1, 1957 (before the strike and the existence of the Journal), and its basic local display rate was $1.40 (R. 1076-1077). The Journal started with a local display rate of $2.10, but in January, 1958, retroactively changed the rate to $1.47 by credit only to future bills (R. 1077).

The Journal also introduced special rates for shoppers' nights, combination rates, free repeat advertising and color advertising free of extra charge for one trial (R. 1077). It did not make these public, but resorted to private concessions to some but not all advertisers (R. 1077).

In February of 1958 U.L.Co. started making approaches to buy out the Gazette (R. 1078).

The strike at the Gazette was settled, and immediately, on May 22, 1958, Loeb detected a slackening of enthusiasm and of interest in the Merchants and commenced paying each $50 a week (R. 1073). These payments were not made public and were given to induce the Merchants and such others as they could influence to advertise exclusively in the Journal and to refrain from advertising in the Gazette (R. 1073). Those from whom the group solicited advertising for the Journal did not know or have reason to know that each member of the group was a paid consultant of the Journal (R. 1073).

On July 31, 1958, Loeb gave the Merchants a conditional written promise to give them 20% of the profits of the Journal (2½% to each of gross profits before federal corporation taxes) (R. 1075). At about the same time the Journal gave J. M. Fields, the largest local advertiser, a rate of 30% lower than other advertisers (R. 1077). This rate was granted irrespective of how much or how little advertising Fields did (R. 904), though other advertisers received discounts based on volume of advertising.

The above discriminatory advertising rates of U.L.Co. were found by the trial Court to be examples of U.L.Co.'s

exclusionary intent and its use of unfair means and an attempt to monopolize in violation of section 2 of the Sherman Act (R. 1093-1094). The Court of Appeals agreed (A.P. 28-29).

On October 21, 1958, Loeb made a written offer to buy the Gazette (R. 1079).

Not wishing to sell out to Loeb (R. 1079), Russ, the managing stockholder of the Gazette, through William B. Parry of the New England Daily Newspaper Association, instituted some exploratory conferences with other newspaper publishers relative to obtaining secured financing, by way of mortgage, for the Gazette (R. 1078, 1079). Several meetings were eventually held in Andover, Massachusetts, at the first of which it became apparent that Muriel Russ, a principal stockholder of H.G.Co., rejected the idea of a loan to be made to H.G.Co., but rather desired to sell her stock (R. 1079-1080).

The general atmosphere reflected the participants' unanimous opinion that in the Haverhill situation only one quality newspaper could make a profit, and also reflected the participants' unanimous hope that the Gazette would be that one quality newspaper which would be profitable (R. 1081-1082). In asides during the course of one meeting, and probably in casual talk across the conference table, some persons expressed strong distaste for what they regarded as the predatory, unfair and unethical competitive methods of Loeb (R. 1082). Reference was made to Loeb's relations with unions, to the timing of U.L.Co.'s entry into Haverhill, to the throwaways published by U.L.Co., and to the Journal's advertising rates (R. 1082).

At these meetings the financial position and condition of the Gazette, including financial, advertising and circulation figures, and the financial prospects for the future, were investigated and examined. A committee of prospective purchasers was formed (R. 1079-1082).

That committee caused the organization of N.N.E. as a Massachusetts corporation about December 10, 1958 (R. 1082). Stock in that corporation was purchased at $25 per share by thirty-three subscribers, who included a number of corporations publishing in their respective cities or towns the only local daily newspaper published there (R. 1082-1083).

Shortly after December 10, 1958 (an elaborate written agreement having been signed on December 10 (Ex. [illegible], R. 1262, 741-742)), N.N.E. bought all of the outstanding capital stock of H.G.Co. (R. 1084). Subsequently advancements by N.N.E. were made to H.G.Co. (R. 1084-1085).

The following factual aspects of N.N.E.'s purchase of H.G.Co. shares as found by the trial Court (R. 1085-1087) and affirmed by the Court of Appeals (A.P. 34) deserve emphasis: The findings are "accepted" by the petitioner (Petition, p. 19) (though petitioner claims different conclusions should be drawn):

(1) U.L.Co. or Loeb was the first to make an oral proposal and the first to make a firm written offer to buy the H.G.Co. shares.

(2) Those who became N.N.E. stockholders were in effect invited by H.G.Co. to make a bid for its stock so that shareholders of H.G.Co. would not be forced to make a sale they did not want to make.

(3) Every N.N.E. shareholder before investing either examined the financial prospects of H.G.Co. or relied upon the business judgment of newspaper experts who had so examined.

(4) Every N.N.E. shareholder believed that an investment in N.N.E. and thus in H.G.Co. was a commercially justified investment.

(5) The belief of N.N.E. shareholders that the investment was commercially justified was a reasonable belief H.G.Co. had been earning upwards of $100,000 a year (R.

636); *it it secured new funds and new management and if it was not faced with unfair competition, it was as of December, 1958, reasonable to believe that within a year H.G.Co. would reach a break-even point and that ultimately it would regain its earlier profitability.*

(6) Every N.N.E. shareholder in purchasing acted in part because he believed that the investment was commercially justified.

(7) Many N.N.E. shareholders in purchasing acted in part because, individually they did not approve of Loeb's tactics in Haverhill, which they regarded as predatory, unfair or unethical.

(8) Some N.N.E. shareholders in purchasing acted *in part* because, individually, they sympathized with the owners of H.G.Co. and feared lest, as Weld phrased it, they "might at some time be victims of a distress similar or akin to that experienced by the Gazette." But, in acting in Haverhill, each publisher acted strictly *ad hoc* and did not make or receive an express or implied, a legal or a moral, commitment with respect to any newspaper situation arising in the future, whether the situation was caused by labor unions, competitors or other circumstances.

(9) No N.N.E. shareholder either sought to accomplish, or did accomplish, any general unification of policy or operations between his business and the business of H.G.Co. or between his business and the business of any other N.N.E. shareholder.

(10) The only operational connection between the business of the Haverhill Gazette and the business of any N.N.E. shareholder was, first, that individuals may be trained at the Gazette as apprentices and thereafter may work for a shareholder in N.N.E., and, second, that at meetings of directors or at meetings of shareholders there may be between N.N.E. shareholders an interchange of information as to newspaper practices and policies. But there is no

evidence in the record that either of these two things was actually ever done or carried out.) *And none of these relationships substantially enhanced or affected the market power of any N.N.E. shareholder.*

The Court of Appeals found that "examination of the record does not persuade us that the findings of fact are plainly wrong" (A.P. 34). (Emphasis supplied.)

On December 15, 1958, a contract was entered into by Loeb and U.L.Co. with the eight Merchants to pay each 3⅛% of the profits of the Journal, or a total of 25% to the eight, but guaranteeing to each an amount of $5000 a year for ten years, and $7500 (the Court's findings say $10,000) (R. 1075) a year for the succeeding ten years (a guaranteed total of $1,000,000), if and when the Journal under Loeb's ownership and control became the *only* newspaper published in Haverhill (R. 1075).

"In view of the effective date of these massive payments, the members of the group of eight knew it was to their 'economic profit to do everything' they 'could to see that Mr. Loeb did own the only paper in Haverhill.' The purpose and the effect of the contract was to intensify the zeal of the eight members of the group both to support the Journal by securing advertising for it and to discourage advertising in The Gazette by their enterprises and other enterprises subject to their influence" (R. 1075).

"[W]hen, following the 'slackening' of interest in the eight consultants, Loeb started to pay each of them $50 weekly, and to make the extravagant promises in the July 1958 letter and December 15, 1958, letter, Loeb (U.L.Co., R. 1074, 1091-1092) was making payments and promises in consideration of each individual's services in inducing the enterprise with which he was connected and such other enterprises as he could influence to advertise exclusively in The Journal and to refrain from advertising in The Gazette." (R. 1092).

"This conduct of Loeb was an encouragement to a group boycott in which each one of the eight consultants acted as a watch-dog with respect to his seven fellows and other advertisers in Haverhill" (R. 1092).

The trial Court found that this group boycott was a restraint of trade in violation of section 1 of the Sherman Act, was conclusive evidence of U.L.Co.'s exclusionary intent, and was proof of U.L.Co.'s attempt to monopolize in violation of section 2 of the Sherman Act (R. 1092-1093); that U.L.Co.'s payment to the eight for their solicitation of outsiders to advertise in the Journal without disclosing to those outsiders that the eight were not disinterested fellow advertisers as they purported to be, but were paid employees of the Journal, was an unfair practice not honestly industrial, was "misleading and immoral," and that such unfair practice not honestly industrial was evidence of U.L.Co.'s exclusionary intent, and was proof of U.L.Co.'s attempt to monopolize in violation of section 2 of the Sherman Act (R. 1092). The Court of Appeals affirmed, confessing "an inability to understand the basis of the petitioners appeal on this question" (A.P. 28).

By the fall of 1958 the Gazette had been "put in peril of insolvency" in the equity sense as a result of the boycotts and U.L.Co.'s other attempts to monopolize (R. 1085). (Emphasis supplied.)

With respect to H.G.Co.'s alleged advertising practices in the fall of 1958 (R. 1095) the District Court found:

1. "Undoubtedly in giving these discriminatory benefits, H.G.Co. was acting *only* AFTER it had been put in peril of insolvency in the equity sense as a result of U.C's attempt to monopolize" (R. III, 45; R. 1095). (Emphasis supplied.)

2. (By implication) the H.G.Co. in giving these "discriminatory benefits," "merely was trying to survive in

the face of an unlawful attack" by the U.L.Co. (R. III, 45; R. 1095).

3. "Admittedly the provocation to retaliate was great" (R. III, 45; R. 1095).

4. ". . . the total number of discriminations was not shown to be large . . ." (R. III, 45; R. 1095).

5. ". . . the period of the discrimination was short . . ." (R. III, 45; R. 1095).

6. ". . . it [the discrimination] cannot be excused on the plea that the discriminatory offers made by HGCo. merely matched offers made by U.L.C." (R. III, 46; R. 1096).

7. U.L.Co. had, previously to H.G.Co.'s extension of alleged discriminatory benefits, engaged in various and extensive conduct and activities which the Court found, as stated *supra*, to be in violation of the anti-trust laws:

(1) The group boycott against the appellant organized by the U.L.Co. with the assistance of the Union (R. III, 26, 41). (See *supra*, p. 7, as to the Court of Appeals decision.)

(2) The group boycott of the Gazette by the eight Merchants who gave over $92,000 of advertising to U.L.Co. for the period December 15, 1957, to September 15, 1959 (the cut-off date fixed by the District Court before trial); who each received illegal "secret" and "immoral" payments of $50 a week from U.L.Co. "in consideration of his individual services in inducing the enterprise with which he was connected and such other enterprises as he could influence to advertise exclusively in the Journal and to refrain from advertising in the Gazette"; who, from December 5, 1957, to September 15, 1959, did no advertising (with two small exceptions) in the Gazette; who received a written promise from Loeb in July, 1958, to give each a percentage of the profits of the Journal under certain circumstances; and who entered into a contract with Loeb and U.L.Co. whereby they (the eight Merchants) would receive at least

a guaranteed total of $1,000,000 if and when the Journal, under Loeb's ownership and control became the only newspaper published in Haverhill. This group boycott, as stated *supra*, was found to be a restraint of trade under section 1 of the Sherman Act and was conclusive evidence of U.L.Co.'s exclusionary intent and proof of U.L.Co.'s attempt to monopolize in violation of section 2 of the Sherman Act (R. III, 23, 24, 25, 42, 43). (See *supra*, pp. 7-9, 12-13).

(3) Discriminatory advertising rates and practices of U.L.Co. to many advertisers, including the largest advertiser in Haverhill (R. III, 43-44). (See *supra*, pp. 8, 9.)

8. The Court made no finding, however, that the beneficiary or beneficiaries of the alleged discriminatory benefits on the part of H.G.Co. promised to reduce or eliminate such business as it or they were doing with a competitor, U.L.Co., in favor of the H.G.Co., the alleged donor of the discrimination.

The District Court concluded that, "because having about fifty percent of the market, and knowing that the market would not permit two contestants to survive," H.G.Co.'s departing from its publicly announced advertising rates and giving discriminatory benefits to a few advertisers even for the limited period involved "*compels*" the conclusion of an intent and attempt to monopolize in violation of section 2. The Court of Appeals reversed and said:

> "In setting aside a decision in favor of Union Leader because of an erroneous ruling, we would normally remand to permit the court to determine this issue. However, we think it has been resolved by the subsidiary findings which the court has already made. In the course of ruling that this method of defending ifself was foreclosed, the court stated that 'in giving these discriminatory benefits, Gazette was acting only after it had been put in peril of insolvency in the equity sense

> as a result of Union Leader's attempt to monopolize. . . . Admittedly the provocation to retaliate was great, the total number of discriminations was not shown to be large, (and) the period of the discrimination was short . . .' We cannot read the opinion without concluding that but for its belief that it was precluded from doing so the court would have found in favor of Gazette. Indeed, we believe any other finding would have been clearly *erroneous*" (A.P. 32). (Emphasis supplied.) (QUESTION I, *supra*, p. 2.)

With the exception as to the respondent H.G.Co., noted immediately *supra*, where the Court of Appeals so reversed the trial Court and dismissed the petitioner's complaint on that point as to H.G.Co., the trial Court, in its partial final decree, dismissed the petitioner's complaint as to all the respondents (R. 5-7, 1101-1106) and the Court of Appeals affirmed (A.P. 37). (QUESTION II, *supra*, pp. 3-4.) Thus, as the case now stands, the only liability found is that of the petitioner to the respondent H.G.Co. upon the latter's counterclaim.

Pursuant to Rule 42 (b) of the Federal Rules of Civil Procedure the trial Court ordered a separate trial of all issues other than issues of damages raised by the pleadings.

Argument.

NOTE ON PETITIONER'S "REASONS FOR GRANTING THE WRIT" (P. 12).

The petitioner cites under the "Reasons for granting the Writ" on page 12 of its petition a quotation from this Court's decision in *Associated Press* v. *United States*, 326 U.S. 1 (1945), at page 20, with respect to freedom of the press. The quotation indicates that the constitutional right

of freedom of the press does not include any right or freedom to combine to keep others from publishing. Of course no such issue concerning a free press exists and no such right to combine is or has ever been claimed by respondents, in the instant antitrust case.

The petitioner further states: "The record here should be scrutinized by this Court to insure that violations of the antitrust laws do not thwart [petitioner's] attempt" to "compete with a long-established newspaper" (the Gazette).

But the only illegal acts and attempts found by the Court of Appeals here involve the petitioner, which has been found guilty of a number of illegal violations of the antitrust laws, to the serious injury of the Gazette. As the Court of Appeals put it (A.P. 35): "A party who pursues an unlawful course of conduct from the moment it appears on the scene is in a poor position to complain of an unfair fight. The more particularly is that so in this case in that NNE, apart from being there at all, was guilty of no unlawful competitive practices."

The illegal actions of petitioner, in this respect, are no longer in dispute, since the petitioner has not preserved these points in its petition (see page 2 of this brief, *supra*). Nor does petitioner dispute the finding of the District Court, affirmed by the Court of Appeals, that H.G.Co. "had been put in peril of insolvency in the equity sense as a result of ULCo.'s attempt to monopolize." Thus this introductory reason of petitioner for granting the writ is presented in an innocent form, but one devoid of any bearing or meaning with reference to this case. It is interesting that petitioner's abandonment herein of all points with reference to its own illegal actions is combined with no reference whatsoever in its statement of the case to its own illegal conduct (except for the two hints on page 3 and in the last paragraph on page 5 of its petition).

ON PETITIONER'S QUESTION I.

In seeking certiorari on this point, the U.L.Co's petition (pp. 16-18) refers at length to the concurring opinion in the Court of Appeals for the tenth Circuit by Judge Phillips. *Moore* v. *Mead Service Co.*, 190 F. 2d 540, 542 (1951). Apparently petitioner's argument is that, even though this Court had remanded that case to that Court of Appeals for further consideration "in the light of this Court's opinion in the *Kiefer-Stewart* case" (*Moore* v. *Mead Service Co.*, 340 U.S. 944 (1951), Judge Phillips (and hence apparently the Court of Appeals in the instant case) failed to follow the guidance of the *Kiefer-Stewart* decision.

To back this up, the petitioner refers, without quoting, to footnote 2 of this Court's decision in *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954), at 118. Footnote 2 states as follows:

> "Respondent contends that the so-called boycott justified its price cutting. In *Kiefer-Stewart Co.* v. *Seagrams & Sons*, 340 U. S. 211, 214, we said, 'If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured.' *We need not pursue the matter*, for respondent obtained a charge on this phase of the case as to which it cannot complain. The District Court charged the jury that respondent would not be liable if the price cutting was 'for the purpose of regaining its own market or of reestablishing competition and not to destroy competition or to eliminate a competitor.'" (Emphasis supplied.)

It can be observed, as it was by the Court of Appeals (A.P. 31, note 13), that there is nothing in the quoted footnote to support petitioner's contention.

As stated by Judge Phillips in his concurring opinion (190 F. 2d at 542):

> "I think Mead should be permitted to justify by showing it reduced its price in good faith solely to break the boycott and not to destroy competition or to create a monopoly."

That Judge Phillips clearly recognized the effect of *Kiefer-Stewart* can be seen from what immediately follows:

> "Of course if Mead carried its price cutting to a degree that would destroy competition and obtained a monopoly by it, or if it cut the price of bread with an intent and purpose so to do, it would not be justified.
>
> "If we deny Mead the right to justify in this case by showing it acted in good faith solely to break a boycott, the statute instead of fostering competition and preventing monopoly, will become an instrument to destroy competition and foster monopoly. Such, in my opinion, was not the intent and purpose of the Congress."

This Court denied certiorari (342 U.S. 902) as to this decision of the Court of Appeals.

While it is true that this Court has disapproved, as petitioner states, "resorts to violations of the antitrust laws as a defense" to an action for illegal antitrust conduct, the petitioner, as was the case in the Court of Appeals, apparently still fails to understand that the question urged by respondent H.G.Co. before the Court of Appeals and specifically ruled upon favorably by the Court of Appeals in its

opinion was, as stated by the Court of Appeals, to determine "*whether the defendant's conduct was, in fact, a violation*" (A.P. p. 30) (emphasis supplied), *i.e.*, whether the H.G.Co. had *in fact* an illegal intent to monopolize, or rather, as was indeed the case, a quite different and lawful intent.

The respondent H.G.Co. thus does not question and has not questioned the principle of the *Kiefer-Stewart* case or of the other decisions of this Court cited by petitioner on page 15 of its petition. These cited cases involve actions held clearly illegal by this Court. But, as stated by the Court of Appeals (A.P. 31), following the principles of this Court's reasoning in *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 623 (1953), the violations of a competitor can constitute a *circumstance* to be considered in determining *whether in fact* the defendant's conduct *was* actually a violation. That was, of course, the question in the instant case. And all that Judge Phillips in his concurring opinion in the *Moore* case had indicated was that the defendant should be permitted to prove that its discriminatory price cutting was only in fact intended to meet the unlawful boycott instituted by the plaintiff, and so to maintain its market position (190 F. 2d 540, at 542).

This Court stated the principle here involved in the *Times-Picayune* case, *supra* (p. 623): "[A]n unlawful trade practice may not be justified as an emulation of another's illegal plan. . . . But that factor is *certainly relevant* to *illuminate ambiguous intent* particularly when planned injury to that other competitor is the crux of the charge." (Emphasis supplied.) This is exactly the principle the Court of Appeals in the instant case applied in determining the intent of H.G.Co.

And the Court of Appeals in the instant case correctly pointed out, it is submitted (A.P. 31), that the mere fact that the competition occurred in a natural monopoly climate, *i.e.*, a city which can only support one newspaper,

surely cannot limit a defendant's right to defend itself. (The District Court had felt that discrimination in such a market "*compels*" a conclusion, irrespective of H.G.Co.'s *actual* intent, of an intent and attempt to monopolize.) Otherwise, as pointed out by the Court of Appeals herein, a competitor which resorts to unfair practices in an attempt to win a natural monopoly area would be less open to repulse than one which enters a normal competitive field. On this point the Court of Appeals had previously indicated: "A natural monopoly market does not of *itself* impose restrictions on one who actively, but fairly, competes for it, any more than it does on one who passively acquires it. *In either event there must be some affirmative showing of conduct from which a wrongful intent can be inferred*" (A.P. 26). (Emphasis supplied.) See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429-430 (C.C.A. 2, L. Hand, Cir. J.). See *United States* v. *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 391-393 (1956).

And, since of course a *per se* violation was not involved, in the absence of such wrongful intent there could be no violation of section 2, *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *Klors, Inc.*, v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 626 (1953).

The defensive efforts to survive of H.G.Co., acting only after it had been put on the verge of insolvency in the equity sense by U.L.Co.'s illegal conduct, did not show an intent to create a monopoly, as the Court of Appeals correctly pointed out (A.P. 32).

The eight points referred to above (pp. 13-15) form the basic background and circumstances under which the Court of Appeals therefore concluded that—*except for* the District Court's belief that the mere existence of small, brief discrimination in advertising by the H.G.Co. (even though purely defensive, "*only* AFTER" it had been put in peril of

insolvency as a result of all of U.L.Co.'s illegal anti-trust activities), but *in a market which only could support one newspaper*, "compels" a finding of a violation—the District Court would not have felt itself bound as a matter of law to find an intent and attempt to monopolize in violation of section 2; and that otherwise the District Court would have found in favor of H.G.Co. As the Court of Appeals stated: "'We have examined the court's opinion in the light of the conflicting analyses made by the parties and agree with Gazette that the word 'compels' as used by the Court indicated a ruling of law and not a finding or conclusion of fact" (A.P. 29, footnote 11).

Further, as the Court of Appeals put it in ruling for the Gazette on this point: "We cannot read the opinion without concluding that but for its belief it was precluded from doing so the Court would have found in favor of the Gazette. *Indeed, we believe any other finding would have been clearly erroneous.*" (A.P. 32.) (Emphasis supplied.)

Moreover, as the Court of Appeals in the instant case also pointed out (A.P. 32, footnote 14): "The case for the Gazette here seems in some respect stronger than the one considered by Judge Phillips. There the defendant was called upon to justify conduct which the statute (not involved here) expressly prohibited. 15 U.S.C. § 13. *In the present case the defendant merely has to rebut an inference of a wrongful intention drawn from particular actions.*" (Emphasis supplied.) Certainly the intent of the *insolvent* (in the equity sense) H.G.Co. under all the illuminating circumstances could in no way be an *intent to monopolize* in violation of the antitrust laws.

As to the petitioner's contention (p. 14) that the respondent H.G.Co. had first started the discriminatory practice, if material, the District Court found and the Court of Appeals affirmed that "Undoubtedly in giving these discriminatory benefits H.G.Co. was acting *only* AFTER it had

been put in peril of insolvency in the equity sense as a result of U.L.Co.'s attempt to monopolize" (R. 1095). (Emphasis supplied.) U.L.Co.'s attempts to monopolize began "from the moment it appears on the scene". (A.P. 35).

And of course the question of the H.G.Co. rates in the period of December, 1957—February, 1958 (see Petition, pp. 6, 14) *does not in any way concern the question of any discrimination by H.G.Co.* The only question involved there was one of a *general rate reduction* given to *all* advertisers, *without discrimination,* and as to this the District Court made a specific finding of no illegality (see R. 1096-1097); and the petitioner never raised any such point in the Court of Appeals, and does not do so now (except as it confuses in its petition the two points (*a*) of non-discriminatory general rate reduction and (*b*) discriminatory benefits to some advertisers. See *Lawn* v. *United States*, 355 U.S. 339, 362-363 (1958).[3]

It cannot be disputed that the Journal first began the discriminatory practices (see page 22, *supra;* see also, as example, R. 902-904, 1205, 1209); as to the Gazette see R. 1095).

Therefore none of the usual reasons in granting a writ of certiorari exist as to question I herein. The decision of the Court of Appeals herein is not in conflict with decisions of this Court or other Courts of Appeals, but is, to the contrary, in full accord with the principle laid down in the *Times-Picayune* decision of this Court.

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[3] Further, even as to this period, the Court specifically found (R. 1076-1077) that the Journal began (December, 1957) with a local display rate of $2.10, but in *January of 1958* it retroactively changed the rate to $1.47 by application of credit to future bills. (Thus it would follow that U.L.Co.'s advertisers who did not contract future bills were discriminated against.) H.G.Co.'s rate of $0.90 (a general rate-reduction to all advertisers without discrimination) was allowed retroactively in February of 1958, when H.G.Co. returned to the $1.40 rate (Ex. S-29, R. 1340, 974).

ON PETITIONER'S QUESTION II.

On this point the petitioner concedes (p. 19) that it is "accepting the factual findings of the courts below" (which it can hardly avoid doing, since these findings were certainly not "clearly erroneous"), but contends that this Court should engage in "drawing the logical although different conclusions therefrom," *i.e.*, inferences and conclusions of an illegal and monopolistic intent, and cites *Orvis* v. *Higgins*, 180 F. 2d 537 (C.A. 2, 1950); cert. den. 340 U.S. 810; and *E. F. Drew & Co.* v. *Reinhard*, 170 F. 2d 679, 683-684 (C.A. 2, 1948). (Actually petitioner on a number of occasions states incorrectly the findings of the Courts below.)

In *Orvis* v. *Higgins*, *supra*, the Court stated, as to an Appeal Court's drawing its own inferences, that such can be done where the inference is "irresistible" and "drawn from the undisputed facts" and "can lead to but one reasonable conclusion" (180 F. 2d at 540). No such "irresistible" contrary inference exists, of course, in the instant case. In *E. F. Drew & Co.* v. *Reinhard*, *supra*, the Court of Appeals said that the contrary inference should be drawn because "what does come before us rationally forbids the conclusions" drawn by the District Court. Such again is clearly not the situation in the instant case. "If, from the established facts, reasonable men might draw different inferences, it is not within the province of this court to substitute its judgment for that of the trial court as to which inference should be drawn." *Widney* v. *United States*, 178 F. 2d 880, 884 (C.A. 10, 1949).

This Court has clearly laid down the correct rule in this respect. In *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 340-342 (1949), this Court stated as follows:

> "Only last term we accepted the view . . . that for triers of fact totally to reject an opposed view im-

peaches neither their impartiality nor the propriety of their conclusions. . . ."

This Court then quoted Rule 52 (a) of the Federal Rules of Civil Procedure, and went on:

> "*Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.* If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an *inference* of guilt and concluded that they bear a different meaning from that for which the Government contends.
> ". . . While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case *where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'*" (Emphasis supplied.)

See also *Commissioner* v. *Duberstein*, 363 U.S. 278, 291 (1960).

Indeed, in the instant case the respondents respectfully submit that there was not actually a choice between two permissible views of the weight of the evidence, because the weight of the evidence clearly and overwhelmingly demonstrated the absence of any such intent in the respondents as argued for by the petitioner.

The District Court found "factually" that there was no such intent as the petitioner imagines (Finding No. 50, R. 1087).

Petitioner states at pages 18-19 of its petition

> "It is, therefore, self-evident that the respondent publishers believed that their investment in the Gazette could not become a profitable investment so long as the competition of the Journal existed. Since no one knowingly makes an unprofitable investment, it necessarily follows that the respondent publishers intended to exclude the Journal from Haverhill. Thus, in accepting the factual findings of the courts below but drawing the logical although different conclusion therefrom, as Rule 52(a) permits, it is inescapable that respondent publishers and NNE demonstrated the exclusionary intent prohibited by Section 2 of the Sherman Act. Here was a clear attempt to monopolize the Haverhill newspaper market. The contrary rulings of the courts below are in conflict with the declaration of this Court on intent in attempted monopoly cases. Swift & Co. v. United States, 196 U.S. 375, 376; United States v. Columbia Steel Co., 334 U.S. 495, 531, 532; Lorain Journal v. United States, 342 U.S. 143, 152."

The clear answer to this is that petitioner has completely overlooked findings of fact 49c, 49d and 49e of the District Court, amply supported by the evidence, as well as finding 50 (R. 1087), referred to *supra* and affirmed by the Court of Appeals, and in particular 49(e) (R. 1085-1086), which is as follows:

> "The belief of NNE shareholders that the investment was commercially justified was a reasonable belief. H.G.Co. had been earning upwards of $100,000 a year; if it secured new funds and new management and *if it was not faced with unfair competition* it was as of December 1958 reasonable to believe that within a year H.G.Co. would reach a break-even point and that

ultimately it would regain its earlier profitability." (Emphasis supplied.)

Further, it was obvious that only one newspaper could survive in a "natural monopoly" market—*i.e.*, a city which could only support one newspaper. As the Court of Appeals put it, "If competition is doomed by market conditions it cannot be 'lessened' by a change of ownership" (A.P. 35). See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429-430 (C.C.A. 2, L. Hand, Cir. J.); *United States* v. *Harte-Hanks Newspapers, Inc.*, 170 F. Supp. 227 (N.D. Tex. 1959). See *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391-393 (1956). This is true whether section 2 or section 7 is being considered.

Apparently petitioner's contention is actually that the Journal, found to be engaged in illegal attempts to monopolize and no longer questioning such findings, was *alone* entitled to survive in a one-newspaper city; that no one could buy out the Gazette stock and lawfully compete, because anyone so buying would know only one paper could eventually survive; that the Journal had a right to continue its illegal conduct and to be that survivor. To state the contention is to show its complete lack of substance. The Court of Appeals replied strongly in answer to U.L.Co's contentions of an "unfair fight" (see *supra*, p. 17; A.P. 35). The rulings of the District Court and of the Court of Appeals here are in no way in conflict with the decisions of this Court. The decisions of this Court cited by petitioner on page 19 of the petition are completely inapplicable to the facts and situation in the instant case.

In further arguing this point in its petition, the U.L.Co. stresses (p. 9) the testimony by the witness Russ of the Haverhill Gazette Co. The statement in question refers to what the interest of Lucey, Hartford and Lawlor "seemed" (to Russ) to be according to a clerk's corporate

record of what was allegedly said by Russ at a directors' meeting. The *impressions* of Russ, according to the clerk, were, as the petitioner conceded (p. 9), denied at the trial by Lawlor and Lucey (R. 447, 461). Furthermore, the District Court made no finding as to this.

The petition, it is respectfully submitted, states incorrectly (at page 11) findings 49a and 49b (R. 1085) in stating "their [the participants in NNE] offer for the Gazette was made so that Loeb would not buy the property" (p. 11). 49a and 49b are as follows:

> "In summary of both what has been already recited and what appears in the record as a whole but has not been expressly recited, the following factual aspects of NNE's purchase of H.G. Co. shares deserve emphasis:
>
> "(a) ULC or Loeb was the first to make an oral proposal and the first to make a firm written offer to buy the H.G. Co. shares.
>
> "(b) Those who became NNE shareholders were in effect *invited by H.G. Co.* to make a bid for its stock so that *shareholders of H.G. Co.* would not be forced to make a sale they did not want to make to Loeb." (Emphasis supplied.)

49b shows that it was the old *shareholders* and *directors* of H.G.Co. who, quite naturally in view of Loeb's illegal competition, did not wish to make the forced sale to Loeb that he was trying to obtain. ("Not unnaturally they were not eager to sell" (A.P. 33).) There is nothing here whatsoever to support the petitioner's contention. Again petitioner ignores findings of facts 49c-e, that the stockholders in N.N.E. believed, and reasonably believed, the investment was commercially justified.

* * * * *

As to petitioner's claim of the existence of a "wider market" composed of some—it is not clear which—New England cities, and of an intent of N.N.E. and its stockholders to monopolize in that market and that competition was substantially lessened therein, petitioner contends that ". . . the respondent publishers recognized petitioner as their potential competitor" (p. 21). Apparently the petitioner's contention is that, though in effect it conceded that no evidence was offered by Loeb (a lengthy witness at the trial (R. 108-255)), its president, principal stockholder and dominant figure (R. 1069), of any potential competitor coming into any so-called "wider market," the *petitioner itself* was in some way that potential competitor; and therefore that the Court of Appeals was in error on what, at any rate, is only a question of evidence, or of inferences or conclusions to be drawn from the evidence, and not grounds for granting certiorari. See *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938).

But no evidence was offered by petitioner to this effect. Petitioner merely complains on page 7 of the petition that the District Court indicated at a pre-trial hearing that it was "more probable than not" that evidence of a "wider market," *if* offered at the trial, would be excluded. The District Court's indications as to what it *might* do in the future *was not a ruling*, and did not, of course, in any way excuse the petitioner from attempting to prove its case, or from making an offer of proof if proper evidence offered were excluded at the trial by the District Court. See *United States* v. *McCoy*, 193 U.S. 593, 598 (1904); *Kerfey v. Worcester Trust Co.*, 253 F. 536, 538 (C.C.A. 1, 1918); cert. den. 249 U.S. 602; *Mexico International Land Co. v. Larkin*, 195 F. 495, 496 (C.C.A. 8, 1912); *Amory* v. *Commonwealth*, 321 Mass. 240, 249-250 (1947). In any event, the refusal by the District Court to admit in evidence the statements as to circulation and as to the population of certain cities,

contained in Exhibit S-33 (R. 1351-1384) was correct, as such statements were "hearsay," as the Court stated (R. 163, 164).

This is certainly not the "foreclosure of petitioner's introduction of evidence" as to a so-called wider market referred to by the petitioner in its conclusion on page 22 of its petition.

Furthermore, the petitioner introduced no evidence that these cities or any of them constituted a relevant market, or that petitioner tried to enter any such particular market. The fact, as indicated by the Court of Appeals, that some of the stockholders of N.N.E., while not fearing competition as such, had opposition to Loeb's methods (found to be illegal by the District Court and the Court of Appeals) would in no case constitute evidence of an illegal exclusionary intent or attempt to monopolize by N.N.E. under section 2, nor the necessary evidence of Loeb or U.L.Co. trying or planning to enter any "wider market." In effect petitioner is reduced to this argument: that, because many of the stockholders in N.N.E. objected to Loeb's and U.L.Co.'s illegal methods and *some* of them feared lest they might at some time be victims of a distress similar to that experienced by the Gazette[4] (Finding 49(h), R. 1086), these feelings in some way *substituted* for the requirements of proof (see Wigmore, Code of the Rules of Evidence (3d Ed. 1942), § 805, p. 169). These requirements are that the petitioner shall at least show, under section 2, a specific intent to monopolize (*Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905)) and, under section 7, "a reasonable probability" or "reasonable likelihood" (*United States* v.

[4] There was no such finding by the District Court whatsoever as that stated by petitioner on page 20 of its petition: "It was also found that some of the publishers acquired the Gazette out of fear that petitioner might invade their towns." (See R. 1081, top of page.)

E. I. du Pont de Nemours & Co., 353 U.S. 586, at 589, 592 (1957)) that an adverse effect on competition was "likely" to occur. And yet petitioner in effect claims (p. 21) that it was excused from demonstrating any such specific intent, and any reasonable probability (or, as the Court of Appeals put it, "*even a reasonable possibility*") (A.P. 37, emphasis supplied) that it would or could or even might enter the area of some "wider market." Loeb never so testified at any time as to even a thought of such entry by him or U.L.Co. Further, as the Court of Appeals said: "*We will not hold that a desire to prevent unlawful competition is evidence of an improper or monopolistic intent*" (A.P. 15). (Emphasis supplied.) And, as previously stated, the District Court held, and the Court of Appeals affirmed, that *every* stockholder in N.N.E. *believed*, and *reasonably* believed, that the investment was commercially justified (Findings 49c, d and e); and that there was no basis for concluding that a (non-investment) motive was primary in any shareholder's decision (R. 1098).

As this Court said in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528-529 (1948):

> "The government's argument, however, takes us into highly speculative situations. . . . Looking at the situation here presented, we are unwilling to hold that possibilities of interference with future competition are serious enough to justify us in declaring that this contract will bring about unlawful restraint."

In conclusion, as the Court of Appeals stated (A.P. 36): "Giving fullest play to the evidence and the (District) Court's opinion, we cannot find that opposition to Loeb was anything more than opposition to his methods. *Union Leader produced no evidence* that the shareholders feared

competition as such, or had any reason to." (Emphasis supplied.)

Even if there *could* theoretically be a wider market, there was thus no evidence introduced or offered by U.L.Co. upon which the District Court could have predicated a finding of any potential competitor,[5] acting lawfully or unlawfully, attempting or likely to attempt to enter such a wider market (see *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948); reh. den. 334 U.S. 862); and no "reasonable probability," therefore, that an adverse effect on competition was "likely" to exist. See *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 589, 592 (1957). Nor was there any evidence of any unlawful exclusionary intent on the part of any of the shareholders of N.N.E.

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[5] At any rate, it would seem only the Government, and not U.L.Co. in a private suit, could raise the point of some *other* competitor intending or likely to compete in the area of the theoretical and unproved wider market. See *United States* v. *Minnesota Mining & Manufacturing Co.*, 92 F. Supp. 947, 962 (D. Mass. 1950); *Alexander Milburn Co.* v. *Union Carbide & Carbon Corp.*, 15 F. 2d 678, 683 (C.C.A. 4, 1926); cert. den. 273 U.S. 757; *Jack* v. *Armour & Co.*, 291 F. 745 (C.C.A. 8, 1923).

Conclusion.

For all the above reasons, it is respectfully submitted that a petition for certiorari should be denied.

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